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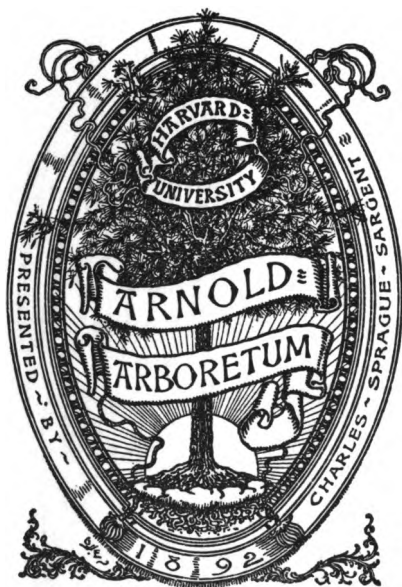
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INJURY TO ROSE GARDENS. Address

By HON. ROBERT M. MORSE *in suits of*
SARAH B. FAY AND OF MICHAEL H. WALSH
against NEW YORK, NEW HAVEN &
HARTFORD RAILROAD COMPANY, 1902

INJURY TO ROSE GARDENS

Address

BY

HON. ROBERT M. MORSE

IN SUITS OF

SARAH B. FAY AND OF MICHAEL H. WALSH

AGAINST

NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY

1902

BOSTON

GEO. H. ELLIS CO., PRINTERS, 272 CONGRESS STREET
1902

Feb. 1912
25889

NOTE.

THE New York, New Haven & Hartford Railroad Company was engaged May, 1901, in burning some old buildings on its land at Wood's Hole, Massachusetts, and in the course of the fire the tar and gravel roof of one of the buildings was consumed. The plaintiffs, Miss Sarah B. Fay and Mr. Michael H. Walsh, claimed that their rose gardens situated across the highway from the Railroad Company's buildings were seriously damaged by this fire; and, as the Railroad Company denied its liability, they brought actions for damages. The cases were referred to Prescott F. Hall, Esq., as auditor; and, at the hearings before him, Mr. Morse and Henry M. Hutchings appeared for the plaintiffs and Thomas C. Day for the defendant. The auditor found in favor of Miss Fay for \$5,387, and in favor of Mr. Walsh for \$16,602.32. Subsequently and before the cases were reached for trial in court the Railroad Company paid \$20,000 in settlement.

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ADDRESS.

THE claims of the two plaintiffs in these actions are not based upon an accident. The damage was due to the intentional setting and maintenance of a fire by the defendant railroad company upon its premises, continuing for three days, beginning the 13th of May, 1901, and ending on the 15th of May. This fire was set in the immediate vicinity of a public highway, where many persons were in the habit of passing to and fro. It was set near a great many wooden buildings, and near valuable lawns and gardens; and throughout its existence it imperilled the safety of the life and the property of the people of Wood's Hole. On the third day of the fire the defendant proceeded to burn the tarred roof of its large engine-house; and the smoke, cinders, and soot from that fire were blown by the south-westerly wind across the highway, and settled upon the premises occupied by Mr. Walsh and by Miss Fay. The circumstances of the fire are stated in detail by Mr. Walsh in Volume I., pages 108 and 109; by Mr. Henry C. Googins, Volume I., page 1; by Mr. Jotham Howes, Volume I., page 12; by Mrs. Ella M. Hinckley, Volume I., page 18.

The record of the course of the winds comes from the Coast Survey Station at Wood's Hole, and will be found in Volume I., page 11.

The poisonous gases caused by this fire have been shown in detail by Dr. Gill, whose testimony appears in

Volume I., page 89. The sample which he analyzed was taken by Mr. Walsh from the premises of the defendant, and given to Dr. Gill. The analysis showed these gases to consist of carbolic acid, pyradine, and sulphur, all well known to be very injurious to plants.

This fire, whatever other damages it may have threatened or actually caused, certainly did this damage: it ruined the most remarkable rose garden in the United States, and it paralyzed the business of the leading rose-grower of this country. I shall not spend much time in discussing the question as to the liability of the defendant for the fire. That the setting of such a fire, and the maintenance of it during those three days on those premises, and under the circumstances disclosed by the evidence, was negligence, needs no argument; and, although my brother has not conceded it, he has not discussed it, and he has shown his wisdom and his legal knowledge by refraining from the discussion.

As matter of record, I cite the cases of

Higgins v. Dewey, 107 Mass. 494;

Milwaukee Railway v. Kellogg, 94 U. S. 469, at page 473;

Hine v. Cushing, 53 Hun, 519;

Snow v. Pulitzer, 142 N. Y. 263,——

all to the general proposition that the acts of the defendant in this case amounted to negligence.

Mr. Justice Colt, of our Supreme Court, said in the case of *Hill v. Winsor*, 118 Mass. 251, at page 259, that it was not necessary that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence of the defendant's act.

That damages to trees, shrubs, and plants from smoke and gas can be recovered, will also be conceded ; but, as matter of record, I desire here again to cite the cases which have been referred to in the course of this hearing : —

Campbell v. Seaman, 63 New York, 568.

Ducktown Sulphur, Copper and Iron Works v. Barnes, 60 Southwestern Reporter, 593.

Broadbent v. Imperial Gas Company, 7 De Gex, McN. & G. 436.

And to the point which is incidental to these cases, that evidence of opinion from competent experts as to the amount of such damage is admissible,—

Vandine v. Burpee, 13 Met. 288.

So much for the facts upon which these cases are based, and for the proposition that these facts constituted negligence for which the railroad company is liable.

The damages in these cases include the value of the plants destroyed and the injury to others which were not destroyed. That rule of damage applies to the claims both of Miss Fay and of Mr. Walsh ; but in Mr. Walsh's case there is, in addition, a claim, first, for interruption to the business and loss of business, which can be recovered under the general claim for damages ; and, secondly, the special damages which are set forth in the declaration, and which include the loss of advertising at exhibitions and the loss of prizes.

The general rule as to the subject of damages is stated in various cases, to which reference may be made : —

White v. Moseley, 8 Pickering, 356,—

in which interruption to business is said to be one of the elements of damage ;

Smethurst v. Barton Square Church, 148 Mass. 261,

where Judge Devens says, "One who violates a duty owed to others or commits a tortious or wrongfully negligent act is liable not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act."

Derry v. Flitner, 118 Mass. 131 ;

Simmons v. Brown, 5 Rhode Island, 299.

In the last case the Court says, "The plaintiff is to be made good for all damage which he has suffered from the injurious acts of defendant."

I refer especially also to the case of *Norfolk & Western Railroad Company v. Bohannon*, 85 Virginia, 293, in which the claim was for damages for destroying by fire an orchard of fruit-trees, and where the company asked that the measure of damages should be simply "the cost of replacing the trees the first proper season for planting after the burning, and the value of the care and labor bestowed on said trees by plaintiffs before the burning, with interest on the value of the care and labor from the time it was bestowed."

The Court says that this is not the correct rule, and that "the measure of recovery is the value of the property destroyed."

The Court further says that the rule as prayed for is "obviously faulty not only in failing to make the question of damage depend upon the actual value of the trees, but in omitting from the calculation certain elements of value which must necessarily be taken into consideration in estimating the loss or damage resulting from the destruction of a vigorous and growing orchard of young fruit-trees."

I wish to cite also the case of *Cochrane v. Commonwealth*, 175 Mass. 299, and especially to call attention to the language of Mr. Justice Loring in the opinion:—

"Where property that is not commonly bought and sold is injured, . . . the market value . . . is its value in view of all the purposes to which it is naturally adapted; . . . (and) it is proper to allow testimony to be given of its value for the special purpose for which it is used."

Also,

Wall v. Platt, 169 Mass. 398,

where a house in Norwood, with furniture and clothing, and also trees and shrubs and vines, were burned by fire set by the New England Railroad, of which defendant was receiver; and it appeared there was no market value for second-hand furniture. The Court says, at page 407:—

"We think that being in the plaintiff's possession, and used and kept for use by her . . . without any intention or expectation on her part of selling them or offering them for sale, they should be regarded as belonging in a sense to the person of the owner, and that damages should be assessed according to the actual worth of the articles to her for use in the condition in which they were at the time of the fire, excluding any fanciful or sentimental consideration."

I will cite also the cases of

Wakeman v. Wheeler & Wilson Manufacturing Co., 101
New York, 205.

Stoner v. Texas Pacific Railway Co., 45 Louisiana
Annual, 115.

Of course, in general, the rule of damages in actions for trespass, or any kind of tort, is the market value of the property destroyed; but that does not necessarily limit the amount of damages, because many articles of personal property may not have a market value, and there may be special reasons why, in a given case, additional damages should be claimed and allowed.

Before considering the testimony in detail on the damages in this case, I must pause for a minute to call the attention of the Auditor to the remarkable character of the witnesses produced by the plaintiff. This case is interesting, not merely on account of the extent and character of the injury which has been done to what I have termed the finest and most valuable collection of roses in this country, but because of the very high character and standing of the witnesses who have been called to testify. I doubt whether any action which has ever been tried in this country has brought together so many men who are the leaders and authorities in this department of floriculture. Aside from those eminent as rose growers, I may refer to Dr. Augustus H. Gill as a chemist of high reputation, and to Dr. George T. Moore, who is the botanist in charge of the physiological laboratories connected with the Department of Agriculture at Washington; and then, coming more directly to the witnesses who have testified as to the character of

these gardens and the value of the plants, to Professor Benjamin M. Watson, who has been for twenty-five years instructor in horticulture at the Bussey Institution, and whose position as a landscape architect and gardener is well recognized in this community ; of the rose growers I name first Mr. Walsh himself, who was gardener in Wales for Simon Yorke, was then with Sir Watkin Williams Wynn, and then at a nursery in Chester, and who, after he came to this country, was foreman for Mr. Payson at his great place in Belmont, subsequently was with Mr. Strong for nearly a year, and then leased the latter's greenhouses and carried on the business there for some three years, and finally became manager for Joseph S. Fay at Wood's Hole, and remained in that position for twenty years. After Mr. Fay's death Mr. Walsh began business on his own account, and for a period of three or four years before the fire he had been carrying on business on these premises. He originated the Jubilee rose, and sold it to Peter Henderson & Co., receiving also the first gold medal awarded in this country for a rose. He originated the J. S. Fay, hybrid perpetual rose ; the Lillian Nordica, hybrid tea rose ; the Débutante, a rambler ; the Sweetheart, a Wichuriana rambler ; the La Fiamma, a rambler ; the Miss Simplicity, a rambler ; the Fairy Queen, a rambler ; the Flush o' Dawn, Aurania, Princess, and Lady Gay, hybrid tea roses and also a collection of three hundred and fifty seedlings none of which has been named. He has exhibited at the shows of all the leading horticultural institutions, — the Massachusetts Horticultural Society, the American Institute, the New York Horticultural Society and the Newport Horticultural Society ; and he was invited by the mana-

ger at the Buffalo Exposition to exhibit at Buffalo last year. He has received the gold medal which I have mentioned, and four silver medals, numerous first prizes and certificates of merit ; and, in fact, at every exhibition at which he has exhibited, he has carried away almost all the first prizes.

Mr. John K. W. L. Farquhar, the first expert whom we called, is a Scotchman by birth, was for four years with the Royal Horticultural Society in London, and was then with Ben Read & Co., nurserymen, at Aberdeen. After coming to this country, for two or three years he was at Forest Hills Cemetery, in charge of the work there ; then he was with John Currier at Lowell ; then he laid out a large tract of land at Whitinsville, and remained there for some years in charge of it ; then, with his brother, he founded the firm of R. & J. Farquhar & Co., which is known throughout the country. He has travelled all over the world in the pursuit of his business, going to China, Japan, Russia, wherever he could learn anything or see anything or do anything in the development of his business. The Commission appointed by the President of the United States to investigate and report upon the Hawaiian Islands, prior to their annexation, requested Mr. Farquhar to examine and report upon the horticulture and floriculture of the islands. He made a thorough examination, and accompanied the Commission on its return to Washington. His services were recognized by the Secretary of Agriculture to have been of such a high character that he was commissioned as Special Representative of the Department. This is a compliment very rarely shown, and only to individuals recognized as leaders in their profession.

We have Mr. Robert Cameron, the head gardener at the Harvard University Botanical Garden for thirteen years. Before he came to this country, he was for seven years on the estate of Sir John Peters Grant, of Perthshire. For three and a half years he was employed at the Royal Botanical Gardens in Kew; and, after he came here, he worked on Mr. Payson's place at Belmont, at Mr. Wood's at Natick, and at Mr. Hunnewell's at Wellesley.

Mr. William H. Elliott, a rose-grower at Brighton for nineteen years, has the most extensive houses within the city limits, and, with one or two exceptions, in New England. He has sixty thousand rose-bushes under cultivation.

Mr. J. Woodward Manning is a landscape architect. For fifteen years he managed the Reading Nursery, which belonged to his father. He has laid out many estates, which he mentioned in detail. He is chairman of the Flower Committee of the Massachusetts Horticultural Society, and he has visited gardens all over this country and in Europe in connection with the study and practice of his profession.

Mr. William N. Craig is at present the superintendent of Mrs. Ames's gardens and greenhouses at North Easton. He had a thorough training before he came to this country,—at Levens Hall, Westmoreland; at Lambton Castle in the employ of the Earl of Durham; at Park Place, Henley-on-Thames, gardener for John Noble; at Crown East Court, Worcester, for Mr. J. F. Dudley; and he carried on the nursery and seed business at Kendal in Westmoreland.

Mr. Arthur H. Fewkes, a florist at Newton Highlands,

chairman of the Committee on Plants of the Massachusetts Horticultural Society, was the chairman of the Committee on Flowers at the time the gold medal was awarded Mr. Walsh for the Jubilee rose.

Mr. Lawrence Cotter is a florist of great experience and most successful in his business. As a young man he worked on the Smith-Barry estate at Queenstown, which he describes as one of the most beautiful places in the world. He was apprenticed to William Horatio Sharman-Crawford at Lakelands, near Cork; then was employed on Lord Doneraile's estate at Cork for two years and a half; was at Dixon & Co.'s nursery in Edinburgh; was then foreman for Mr. Malcolmson at Portlaw, county Waterford, Ireland; and was employed at Dickson's, nurseryman, at Chester. After he came to this country, Mr. Cotter was foreman for a gentleman at Charlestown, N.H., until he came to Boston, since then his record is well known. He is a member of the Executive Committee of the Society of American Florists, the only horticultural society chartered by the United States government. This is a society of the leading florists of this country. It holds a national convention each year. Its special object is to bring the commercial floriculturists of this country together and to keep out frauds and extraordinary advertisements, and to supervise the nomenclature of plants. New roses have to be registered by the society before they are considered as having any standing; and they come before the Executive Committee for approval. He has also served as judge of roses at a great number of exhibitions.

These are the witnesses whom we have called to testify to the character of these gardens and of these roses,

and to the amount of damage that has been done. If it had been possible to select from all the specialists in this business in this country, or in this part of the country, men of higher reputation or longer experience, they would have been called. Nobody has appeared or has even been named who can compare with them. These gentlemen are the highest authorities on the subjects covered by these suits.

I consider first the claim of Miss Fay for 2,000 plants, of which two-thirds were destroyed.

Mr. Cotter says (Vol. II., page 343) that her roses were the finest collection in this country, the best established, all magnificent in health and variety.

Mr. Elliott (Vol. II., page 284) gives substantially the same opinion.

The damages have been estimated by the different witnesses as follows :—

					<i>Vol. Page</i>
<i>Walsh</i> . . .	2,000 plants (average damage)	\$3.50 =	\$7,000		(I. 123)
<i>Farquhar</i> . . .	2,000 at \$3,	\$6,000			
(Worth, after fire)	650 " 1,	650	=	5,350	(II. 266)
<i>Elliott</i>	2,000 " 4,	\$8,000			
(After fire)	650 " 2,	1,300	=	6,700	(II. 284)
<i>Watson</i>	2,000 " 1.50,	\$3,000			
Present value	500		=	2,500	(II. 303)
<i>Fewkes</i> , 1,355 destroyed at	3.50,	\$4,742.50			
Damage to remaining . .	385.86		=	5,128.36	(II. 317)
<i>Cotter</i> , simply a loss of blooms .				6,082.50	(II. 343)

The average of these six witnesses is \$5,543.47 ; and this, I submit, is a fair estimate of the damage sustained by Miss Fay. The estimates, as the Auditor will see, range from a very low one on the part of

Mr. Watson,—an estimate which he himself stated he considered very conservative, to that of Mr. Walsh, of \$7,000; but \$5,543 is under the estimates of Mr. Cotter and of Mr. Elliott, and is very nearly the estimate of Mr. Farquhar. Mr. Farquhar's estimate was \$5,350, and this average is \$5,543. So that I think, in claiming that average as a fair statement of Miss Fay's claim, I am making a reasonable claim.

I come now to Mr. Walsh's roses. Mr. Farquhar said (Vol. I., page 208) that Mr. Walsh's reputation in 1900 was unique; that no man in this country began to compare with him; that his displays were the best he had ever seen in this country.

Mr. Cameron says (Vol. II., page 268) that his roses were the very best.

Professor Watson says (Vol. II., page 300) that his roses were first-rate in every way.

Mr. Fewkes says (Vol. II., page 308) that his roses were uniformly first-class.

Mr. Cotter says (Vol. II., page 334) that they have never been equalled in this country.

Mr. Manning says (Vol. III., page 368) that they are unsurpassed in this country.

Mr. Craig says (Vol. III., page 408), "The highest I have seen of any exhibitor in America without exception."

That is a record for a man to be pretty proud of, and I hope that it will be one of the compensations to Mr. Walsh for the expense and worry and the loss occasioned by this fire that he will be able to publish these extracts from the testimony of these authorities.

Mr. Walsh's garden, consisting of this most remarkable collection of roses,—and I am sure that the Auditor, as well as the rest of us, was amazed at the ease with which Mr. Walsh gave the individual names of the thousands of roses which he had there, a collection which could not be duplicated for years, certainly, in this country,—this garden, this harvest which he was in a condition to reap as the result of his skill and labors, was blotted out as completely and suddenly as St. Pierre was by the eruption of Mt. Pelée.

Let us consider briefly — and I do not propose to go into any detail which is not necessary — the elements of his damage. In the first place : —

(a) Beds 1 and 2, containing 2,500 stock plants, which were valuable to propagate from, and for hybridizing, and as a source of income by the sale of blooms. I have a memorandum to cite with special application to this claim,—

Wall v. Platt, 169 Mass. 398 ;

Murray v. Stanton, 99 Mass. 345 ;

but I will not spend time in discussing the propositions of law.

The estimates of damage to these beds are as follows : —

<i>Walsh</i>	2,500 at \$3,	\$7,500		<i>Vol. Page</i>
(Saved)	800	250	\$7,250	(I. 120, 121)
<i>Farquhar</i>	2,500 at 3,		7,500	(I. 217)
<i>Elliott</i>	2,500 " 2.50,		6,250	(II. 282)
<i>Watson</i>	2,500 " 2,		5,000	(II. 303)
<i>Fewkes</i>	2,494 " 1.60, \$3,990.40			
Loss on crop, 1902		2,793.28	6,783.68	(II. 313, 314)

<i>Cotter</i>	2,500 at \$3.50,	\$8,750	<i>Vol. Page</i> (II. 338)
<i>Manning</i>	2,500		
	600 " 4,	7,600	(III. 373)
<i>Craig</i>	2,500 " 3, \$7,500		
	639 " .20, 130	7,270	(III. 410)

The average damage as estimated by these eight witnesses is \$7,050. That amount, as the Auditor will see, is less than the estimate made by Mr. Walsh, Mr. Farquhar, Mr. Cotter, Mr. Manning, and Mr. Craig. It is very near the estimate made by Mr. Fewkes. It is larger than the estimate made by Mr. Elliott and Professor Watson. On the whole I submit that it is a fair estimate of the damage to these lots.

(b) Bed 3, 1,289 plants. These were young plants; had been planted out only six months. They were of an age when they could have been taken up and transplanted without injury. The estimates concerning the value of these plants are as follows:—

<i>Walsh</i>	1,260 at \$0.50, \$630		<i>Vol. Page</i>
	Less 200 " .20, 40	\$590	(I. 121)
<i>Farquhar</i>	1,289 " .50,	644.50	(I. 217)
<i>Elliott</i>	1,289 " .60,	773	(II. 282)
<i>Watson</i>	1,300 " .50,	650	(II. 303)
<i>Fewkes</i>	1,289 " .50, \$644.50		
Loss on crop	618.72	1,263.22	(II. 315)
<i>Cotter</i>	1,289 at .50,	644.50	(II. 338)
<i>Manning</i>	1,289 " .40, \$512.90		
	Less 201 " .20, 100.50	412.40	(III. 374)
<i>Craig</i>	1,289 " .50, \$644.50		
	Less 205 " .20, 40.10	604.40	(III. 409, 410)

I will call attention to the fact that Mr. Fewkes, in addition to his estimate of 1,289 plants at fifty cents

apiece, \$644.50, makes an estimate on the loss of the crop; but as his estimate on the value of the plants is very nearly as much as that of the other witnesses, and I do not desire to make any unreasonable claim here, I shall omit the statement made by Mr. Fewkes as to that loss.

The average of these eight witnesses, omitting, as I said that I should omit, Mr. Fewkes's estimate on the loss of the crop, is \$620 for the loss of Bed 3. This figure is a little more than Mr. Walsh's estimate: it is less than Mr. Farquhar's, than Mr. Elliott's, than Professor Watson's, than Mr. Cotter's. It is very near the estimate of Mr. Craig, and somewhat more than the estimate of Mr. Manning; but these figures, as the Auditor will see, do not vary very much. \$620 I take as a fair estimate of the damage to Bed 3.

(c) *J. S. Fay*. This rose has been conceded by all the witnesses to be a valuable garden rose, with rich blooms, and with great wealth of foliage. We come now, of course, to estimating a different kind of damage. We are now talking about plants originated by Mr. Walsh, belonging to him, from which he could propagate to an indefinite amount, and could sell the plants so propagated. Of course, the highest value of such a rose as this to him would be in his ability to do that. The fact that he has a certain number of plants remaining is of no consequence unless those plants are healthy and suitable to propagate from as all the experts agree that it would be unwise to attempt to raise roses from sickly plants. He could not, consistently with his reputation,—he could not with any hope of success,—undertake to put on the market roses propagated from inferior stock.

	Vol.	Page
<i>Mr. Walsh</i> estimates that his damage, by the destruction of 13 out of the 33 plants, and the serious injury done to the remaining 20, is	\$3,500	(I. 122)
<i>Mr. Farquhar</i> estimates that damage at	3,000	(I. 217)
<i>Mr. Elliott</i> does not give an estimate in money, but he gives the number of eyes which there were upon these plants, and indicates the value for purposes of propagation		(II. 296)
<i>Mr. Watson</i> says that this stock of Fay roses was worth from \$1,500 to \$2,500, and that the stock remaining is worth from \$500 to \$1,000. I have taken the higher figures in Mr. Watson's case, because I think that all his estimates are very low; and, taking the higher figures, that would make, for Mr. Watson's estimate of the damage	1,500	(II. 303)
<i>Mr. Fewkes</i> puts the damage at	3,562.50	(II. 316)
<i>Mr. Cotter</i> puts the damage at	2,000	(II. 338)
<i>Mr. Manning</i> , whose estimate is very far below that of the others, and, in my judgment, entirely insufficient, although I have counted it in here,—Mr. Manning puts the value of the Fay rose at \$1,200, and the value of the remaining stock at \$500, making a net damage of	700	(III. 378)
<i>Mr. Craig</i> estimates the value of the stock before the fire at \$2,500, and the value of the remaining stock at \$1,000, a total damage of	1,500	(III. 413)

Adding together the estimates of these seven witnesses, and dividing the total by 7, we get an average damage to the J. S. Fay rose of \$2,451. That is more than \$1,000 less than Mr. Walsh's estimate and Mr. Fewkes's estimate. It is \$550 less than Mr. Farqu-

har's; but it is more than the estimate of Mr. Watson, Mr. Cotter, Mr. Manning, and Mr. Craig.

Of course, neither in this nor in any of these other items can it be expected that men looking at these roses and the damages, from their special points of view, would agree exactly. It would be suspicious if they did agree. The fact that they have arrived at these independent conclusions, and have given their reasons for them, and have stated them as they have done, is the best guarantee to the Auditor that their opinions are valuable, and that they are honest; and I submit that it is fair to take the average of these opinions as a basis for the claim which we make. That average in this case, as I have said, is \$2,451.

(d) Bed 4, *Débutante*, Climbing Rambler rose, suitable for parks, trellises, and about houses. Of these there were 22 plants. There is considerable difference here among the witnesses as to the value of the plants before the fire, and as to the extent of the damage.

		Vol.	Page
<i>Mr. Walsh</i> says that the plants before the fire were worth . . .	\$3,500		
and that they are now worth . . .	<u>1,000</u> only,		
making a total damage of \$2,500	(I.	121)
<i>Mr. Farquhar</i> says that the plants were damaged to the amount of	1,500	(II.	222)
<i>Mr. Watson</i> says that the plants before the fire were worth . . .	\$1,000		
and that they are now worth . . .	<u>500</u> only,		
making a total damage of 500	(II.	303)
<i>Mr. Cotter</i> says the plants were damaged to the amount of	3,250	(II.	338)
<i>Mr. Manning</i> says the plants were damaged to the amount of	500	(III.	377)
<i>Mr. Craig</i> says the plants were damaged to the amount of	1,250	(III.	413)

I have given you the estimates of six witnesses. The average of these estimates is \$1,625. That is nearly \$1,000 less than Mr. Walsh's estimate, and it is more than Mr. Farquhar's estimate. I submit this as a fair estimate of damage. I concede in that a good deal of what my brother Day said in regard to the Débutante, that there is value—in fact, all these witnesses say there is value—in the plants remaining; but they have been damaged, and the testimony of the witnesses, which I have not time to read in detail, states the extent to which they have been damaged.

(e) The *Sweetheart*, in Bed 6. This is a *Wichuriana* creeping rose, to plant along parkways, and so on. I have said already, but I may as well repeat, that these are roses of which Mr. Walsh was the originator, the propagator. He had 24 of these plants.

			<i>Vol.</i>	<i>Page</i>
<i>Mr. Walsh</i> says that the plants before the fire were worth . .	\$1,000			
and that they are now worth . .	100 only,			
making a total damage of	\$900	(I. 122)		
<i>Mr. Farquhar</i> says that the plants were damaged to the amount of	750	(I. 222)		
<i>Mr. Watson</i> says that the plants before the fire were worth . .	\$1,000			
and that they are now worth . .	500 only,			
making a total damage of	500	(II. 303)		
<i>Mr. Cotter</i> says that the plants were damaged to the amount of	1,200	(II. 338)		
<i>Mr. Craig</i> says that the plants were damaged to the amount of	1,250	(III. 406)		

Here are five witnesses estimating these roses; and the average of their testimony is \$920, which is very near the estimate of Mr. Walsh.

(f) The *Lillian Nordica*, hybrid tea rose. This rose was totally destroyed, all the plants were totally destroyed, and this was one reason why most of our witnesses did not estimate as to its value; and Mr. Walsh, although he had mentioned the rose in his earlier testimony accidentally omitted until a later stage of his testimony to estimate its value. He did however estimate the loss to him of all the plants of the *Lillian Nordica* at \$1,500 (Vol. III., page 350).

		Vol.	Page
<i>Mr. Manning</i> says that the loss was	\$500	(III.	377)
<i>Mr. Craig</i> says the loss was	1,000	(III.	412)

The average of those three is \$1,000, and I claim that \$1,000 is a fair statement of the amount of that damage.

(g) 350 seedlings, Bed 5.

		Vol.	Page
<i>Mr. Walsh</i> said that they were worth before the fire	\$1,500		
and after the fire they were worth	500		
total damage	<hr/> \$1,000	(I.	122)
<i>Mr. Farquhar</i> says that they were damaged to the amount of	3,500	(II.	222)

Right here I want to say, having in mind especially what my brother Day said on this point, that one great explanation of the difference between Mr. Farquhar and Mr. Walsh in this estimate is this: Mr. Walsh is a florist, a gardener, a cultivator and propagator of flowers. Mr. Farquhar is a man of business, who is constantly in contact with business men and knows what commands value in the market; and he appreciates better, or did appreciate better, than Mr. Walsh the commercial value of a bed of 350 seedling roses which had not been

named and had not been put on the market. It is, of course, quite possible that some of them may not have been worth much; but, on the other hand, the chances that others were of great value would be, in the estimate of Mr. Farquhar, sufficient to justify a claim of \$3,500 damage. His testimony is in Volume II., page 222.

Mr. Watson, who, as I have said, all the way through is most conservative in his values, says that that bed of seedlings was worth anywhere from \$3,000 to \$6,000, and was damaged anywhere from \$1,500 to \$3,000 (Vol. II., page 303); and I take, as a fair average, or as a fair result, of all that, \$2,250 as the amount of his estimate.

Mr. Cotter, who gives some other values higher than some of the witnesses, is lower here than others. He puts the same estimate on the amount of this injury that Mr. Walsh does,—\$1,000 (Vol. II., page 338).

Mr. Manning estimates the damage at \$2,000 (Vol. II., page 377).

The average, taking these five into account, is \$1,930. Considering the fact that Mr. Watson, the most conservative witness here, says that this bed of roses may have been worth anywhere from \$3,000 to \$6,000, and the damage anywhere from \$1,500 to \$3,000, I submit that an estimate of \$1,930 as the amount of the damage to this bed is a reasonable and conservative estimate.

Adding together these different items,

(a) \$7,050

(b) 620

(c) 2,451

(d) \$1,625

(e) 920

(f) 1,000

(g) 1,930

which are, as I have shown, the average estimates of these witnesses on the different items of our claim, we have \$15,596 as the damage to the plants belonging to Mr. Walsh. These figures, in one sense, are large: in another sense they are small. Think of the Lawson Pink selling for \$30,000, and then that all the damage that our witnesses have put on the most remarkable collection of roses which existed in the United States is only half that sum! Think of the stock of goods of a merchant in his store, think of the value of a library which a man has been collecting for years, and in which he has the choice specimens of all literature, and see how large those values are in comparison with this, — how very small this claim seems to be; yet Mr. Walsh's collection was of unique and peculiar value.

In addition to the damages claimed as above, Mr. Walsh is entitled to special damages: —

(1) For the loss of prizes which he might have got; and

(2) For the loss of advertising which he would have had if he could have exhibited in 1901.

I cite, as bearing on the proposition that claims for such items can be recovered, the cases which were called to the attention of the Auditor in the course of the hearing, —

Adams Express Company v. Egbert, 36 Pa. State, 360;
Simpson v. London & N.W. Railway, 1 Q. B. D. 274;

and one case which was not cited to the Auditor in the earlier discussion,—

Armistead v. Caledonian Railway Company,

which is reported editorially in “ American Gardening ” of August 24, 1901. My brother Hutchings, who has made a most exhaustive study of roses and of all law pertaining to roses, discovered it in that report, which would not ordinarily, I suppose, be cited in courts of law. This case was tried in one of the sheriffs’ courts of Scotland. According to the report the plaintiff was a gardener of repute. He had some one hundred and fifty chrysanthemum blooms in bottles, which were being transported in vans of the defendant railway, to an exhibition. By a collision the blooms were injured. The sheriff found the defendant liable, and awarded damages in the sum of sixty pounds “ for loss of chance of gaining Edinburgh City Cup and other prizes, with accompanying loss of money, professional distinction, and advertisement.”

Those cases, all of them, sustain the proposition that at least, as matter of special damage, we can recover for loss of prizes and for loss of advertising. Of course, it is difficult to estimate in dollars and cents what this damage amounts to; but it is no more difficult than it is for a jury to estimate what the damage to a man is whose leg has been broken or whose health has been impaired. You must find in money the equivalent of what the party has lost. Our estimates are so small that I do not suppose that anybody will question that we ought to have the largest figure which is given.

Mr. Farquhar says (Vol. II., page 226) that the

loss of prize money to Mr. Walsh during the time that has elapsed since this fire would be anywhere from \$300 to \$500; and the loss of advertising, which is of course the result of not being able to exhibit, \$1,000. For Mr. Walsh to drop out of all the floricultural exhibitions for two years at least, his name not to appear anywhere, is a very serious loss to him,—must be; and I submit that \$1,000 is a very moderate estimate.

Mr. Fewkes says that the loss of prize money amounts to from \$250 to \$300.

Mr. Manning sets this damage at \$1,000.

I have called this item of special damages \$1,500, to which at least Mr. Walsh is entitled. Adding the \$1,500 to the \$15,596, we have a total of \$17,096.

In addition to these claims, Mr. Walsh is entitled to damages for loss to his business, interruption to his business. That comes, as I stated in the beginning, under the general head; but I have not made a special estimate of it, except as I will refer to it in a moment.

In addition to this, both parties are entitled to interest. Interest is to be added to make them whole. The damage was done in May, 1901. Mr. Walsh and Miss Fay were entitled to their money then. If they had had their money then, it could have been used as capital. Mr. Walsh could have bought new plants with it. He could have gone ahead with his business. Of course, getting his money now, at the end of a year and a half, is a very different matter. That interest may be added, and should be added, in all cases of this kind, I need cite only the case of

Fraser v. Bigelow Carpet Company, 141 Mass. 126.

Miss Fay's damage, as I have stated, is \$5,543; and she is entitled to interest on that sum from May 15, 1901, to the date of the Auditor's report.

Mr. Walsh's damage, omitting the special damages on which I have not figured interest, is \$15,596. Interest on this sum from the 15th of May, 1901, to the 15th of August, 1902, is \$1,169.70. If you add this to the amount of the damages, \$15,596, and then add the amount of the special damages, \$1,500, you have \$18,265.70 as the amount of Mr. Walsh's damages. This does not include anything on account of injury to his business in the general sense, which, as these cases state, is an element of damage.

But taking these items into consideration, and further the fact that Mr. Walsh for two years at least has been practically kept out of the business which other men have been able to engage in, and in which he otherwise would have been prominent, I submit that the claim of \$20,000, which is the figure allowed by the Court in the amendment which we made to this writ, is a reasonable and a proper sum to be allowed. I claim that \$20,000 does not exceed at all the fair estimate of his damage.

Thus far I have referred to the plaintiff's evidence only; and I shall have very little to say in regard to the defendant's, simply because it is entirely inadequate to meet the claims and the evidence of the plaintiffs.

My brother Day says, with truth, and evidently with some satisfaction, that he had nothing to do with the preparation of this case. Where and how the witnesses who were produced by the railway company were got together nobody will probably ever know. No respon-

sible person has come in here to explain on what principle they were selected. The defence calls five witnesses. One of them, Mr. Olive, I have no occasion to say anything about, because his testimony does not touch on anything vital in the case. The other four witnesses are Mr. Montgomery, Mr. Shea, Mr. Coleman, and Mr. Fee. Of these four, Mr. Montgomery is the only one who is of the same class as the witnesses called by the plaintiffs. Mr. Montgomery, I am ready to concede, is a man of experience in his business, and competent to testify to anything he knows about; but Mr. Montgomery told you at the start that he did not consider the damage to the plants at all and that he does not know anything about hybrid roses, that he does not know anything, and never knew anything, about the J. S. Fay, the Débutante, the Sweetheart, or the seedlings, and therefore he gives no help whatever to the Auditor in his estimate of damage.

Mr. Shea, who is a local florist at Jamaica Plain, where I live part of the year, and who bought out the greenhouses of Mr. Spooner, and has been carrying on business in a small way there, testifies that he was not asked to form an opinion as to the damage to the plants which suffered from the fire (Vol. III., page 449), and that he did not feel like expressing an opinion on the seedlings or Débutantes (Vol. III., pages 457, 458). He confined himself to estimating the amount of loss on the blooms last year, which is such a slight part of the claim of the plaintiff that it is not worth while to spend time over it.

Mr. Coleman is not a practical florist at all. He is employed by Mr. Galvin to sell roses. He is not a

grower of roses, and he never has been. He says (Vol. III., page 461) that he did not care to express an opinion as to the value of the plants.

Mr. Fee is a gardener for my neighbor, Mr. Ross, and has the care, I believe, of two hundred roses. He said that he could express no opinion as to the plants.

Of these four witnesses called by the railway company, not one testified that he was asked to examine the plants with a view of estimating their value. Not one of them testified with regard to the amount of damage to the plants. All of them confined themselves to speculating as to the number of blooms which could have been sold less than those which otherwise would have been obtained from the plants. They failed, all of them, to meet the real issue in the case. The railway company did not want, or could not get witnesses, whichever way it is pleased to put it, who were of the class of the plaintiff's witnesses, competent to estimate the value of the plants, competent to appreciate the amount of damage, and willing to testify fearlessly as to the amount of that damage. I say, therefore, that the Auditor ought to disregard this testimony entirely.

My brother Hutchings calls attention to the fact that Mr. Shea did express an opinion as to the value of some of the plants, and that he is the only one of the railway witnesses who testified on that point. He says (page 454) that he valued the 2,500 stock plants in beds 1 and 2 at from \$1 to \$3, and called the average \$2. That is the same figure which Mr. Watson put upon the plants. So far, therefore, as any witness for the railway company attempted to value the plants themselves, he confirmed the lowest estimate on our side.

I need not say to the Auditor that this case is one of very great importance. It is important in a certain sense to the profession, not only to the profession of law but to the profession of florists, because no action involving so serious a damage to plants or flowers has ever arisen in this country; and, while there may not be much law to be settled by it, it still will always be of interest. But that is a purely professional interest.

It is a case of peculiar importance to Mr. Walsh, because it involves everything he had in the world. It was all swept away by the fire, practically all swept away by the fire, and the amount that he may recover in this action will be the capital on which he can begin anew; and, while that does not entitle him to anything more than the evidence justifies, it does entitle him to receive, and I am sure you will give him, the full amount which the law and the evidence show you ought to award.

